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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

David Allen Harbour,

Defendant.

Case No. 2:19-cr-00898-DLR

**DEFENDANT’S MOTION TO
STRIKE THE GOVERNMENTS
SUPPLEMENTAL RESPONSE TO
THE RULE 29 AND 33 MOTIONS**

(Oral Argument Requested)

Defendant David Allen Harbour, by and through his attorneys, submits this Motion to Strike the Governments Supplemental Response to the Defendant’s Renewed Rule 29 and 33 Motion filed on June 23, 2023.

BACKGROUND

As of the time of the filing of this Motion, the Court had acquitted Defendant of Counts III, XXI, XXII, and XXXIII. Doc. 757. The government filed its supplemental response with exhibits to the Defendant’s Rule 29 motion prior to Doc. 757, on June 23, 2023. *See* Doc. 754. In that “supplement,” the government sought to address a single issue, which is Princeton Alternative Income Fund (“PAIF”), which was the totality of

1 this Courts recent acquittal. Despite the acquittal, a brief response from the Defendant is
2 required to preserve the record and to keep the Court informed, honestly, as to the state of
3 affairs, given that the supplemental pleading is, like much if not most of the
4 government's filings, loaded with misrepresentations.
5

6 In its supplement, the government attached Exhibit B, which is a string of emails
7 from PAIF representatives to the government and an attached spreadsheet allegedly
8 submitted by PAIF. The submission of this email and document was a last-gasp attempt
9 borne out of obvious desperation to thwart what the government had every reason to
10 believe was the Court's likely dismissal of the largest dollar-volume set of claims.
11

12 Deliberately, with actual knowledge both of the underlying impropriety of foisting
13 on any Court new materials never presented to the jury in post-trial motions but also of
14 the Court's specific order to the prosecutor to not argue anything that was not contained
15 in the evidence submitted to the jury, the government sought to back-door "new
16 evidence" into the record that had never been presented to the jury. *See* TT. June 6, 2023
17 pg. 44-45.
18

19 Exhibit B is a package of materials presented to the Court's presentence writer by
20 PAIF for use in sentencing. It is misleading, at best, except where it is not completely
21 false. The temptation is great to take it on, here, piece by piece. After all, having so
22 flagrantly breached its duties as the "minister of Justice," as well as this Court's direct
23 order, the government would hardly be in any position to criticize the Defense for
24 responding in kind. But, the Court could rightly be critical and we want the Court to have
25 the clearest of fields to address the government's tactics.
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1 Leave it at this: Sadly, the prosecutor has been completely hoodwinked by PAIF,
2 just as the government was hoodwinked by Bart Shea. This occurred because the
3 government's obsession over the Defendant has replaced good sense.
4

5 Motions to strike are governed by LRCrim 12.1, which incorporates the local civil
6 rules 7.1 and 7.2. LRCiv 7.2(m) in turn governs motions to strike. First, the supplement
7 should be stricken as it is now moot with the Court's ruling to acquit the PAIF counts.
8 Second, the supplement also argues evidence that is outside of the evidence presented at
9 trial. In the event the Court is not inclined to strike the supplement, Defendant asks that
10 the Court invite a substantive response to the supplement.
11

12 **ARGUMENT**

13 **I. The government's supplement is an improper argument and must be stricken.**

14 First, it is unclear from what source the government conjured the right to
15 supplement its filed response to the Rule 29 and Rule 33 post-trial motions. There is no
16 rule that permits supplements without leave. Nor do we see that the government lodged
17 the pleading along with a motion to permit its filing.
18

19 More importantly, this Court was explicit – no evidence from outside of the trial
20 was to be argued by the government. *See* TT. June 6, 2023 pg. 44-45. Yet, knowing it
21 could not do so, the government submitted a new exhibit containing new financial
22 records and statements from PAIF representatives (who had been sued for racketeering
23 by the United States (of America) Trustee in the PAIF Chapter 11 and who have now
24 been sued by the United States (of America) Securities and Exchange Commission. It is
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indeed noteworthy that the United States (of America) Attorney has sided with PAIF against the positions of other agencies of the same United States of America.

The issue with this evidence could not be plainer; the government seeks to supplement what was, and this Court has now found, insufficient evidence to sustain a conviction on the PAIF Counts. The government's supplemental response must be stricken due to the incredibly prejudicial nature of the government's actions, improper argument by attempting to circumvent the jury process, and another fatal variance by the government. *See United States v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014) (quoting *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984)); *United States v. Morse*, 785 F.2d 771, 775 (9th Cir. 1986).

CONCLUSION

The government's unauthorized supplemental response is moot, as this Court has already acquitted the defendant based upon a series of grounds. More importantly, the government's supplemental response seeks to have the Court consider hearsay that was not introduced at trial. In the alternative, Defendant respectfully requests leave to substantively respond to the supplement and to its Exhibit B.

RESPECTFULLY SUBMITTED this 30th day of June 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and for transmittal of Notice of Electronic Filing to the following CM/ECF registrants:

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